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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

IMPACT DIE CASTING CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60604

TWENTIETH CENTURY PRESS, CHICAGO 60605

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This Reply Brief is filed by Petitioner, Impact Die Casting Corporation, in response to the Brief in Opposition filed with this Court by Honorable Robert H. Bork, Solicitor General of the United States, on behalf of the National Labor Relations Board (hereinafter called "Board").

ON THE RECORD AS A WHOLE, IT REMAINS CLEAR THAT THE BOARD EMPLOYED A "PARTIAL MOTIVATION" STANDARD IN FINDING THAT BOYCE'S DISCHARGE VIOLATED THE ACT.

In the brief filed on behalf of the Board, it is argued, in substance, that the legality of the "partial motivation" standard cannot be assailed in the instant case because such standard was not in fact relied upon by the Administrative Law Judge in reaching his decision. In so arguing, the

Board seemingly would have this Court disregard the Law Judge's finding that "In any event, it is clear that Boyce 'was discharged at least in part because of union activity . . . '" (A-28) Seeking the minimize the effect of the foregoing language, the Board observes:

> ". . . That statement must be read in light of his [the Administrative Law Judge's] other conclusions that the asserted grounds for discharge were pretextual and that Boyce would not have been discharged 'but for the fact that she was a prime mover . . . of the union drive . . . '" (See Brief in Opposition, pg. 6, footnote 3).

We submit that a correct reading of the Law Judge's decision leads to precisely the opposite conclusion from that advanced by the Board, namely, that the partial motivation finding constitutes the operative and definitive statement of the Law Judge's conclusions with respect to the circumstances of Boyce's discharge. All other findings and dicta concerning Petitioner's motives must by necessity be read in light of the penultimate statement that "*In any event* it is clear that Boyce 'was discharged *at least in part* because of union activity . . .'" (emphasis added).

Moreover, any suggestion that the partial motivation language is mere surplusage ignores the fact that such terminology has been deliberately used by the Board as its *ratio decidendi* in numerous discrimination cases. See, for example, *Pacific Plywood Company,* 134 NLRB No. 77 (1961), *American Compressed Steel Corp.,* 152 NLRB No. 39 (1965), and *Tom Wood Pontiac, Inc.,* 179 NLRB No. 98 (1969) enf'd. sub nom. *NLRB* v. *Tom Wood Pontiac, Inc.,* 447 F.2d 383 (7th Cir., 1971).

For the reasons stated, this Court should not permit the Board to side-step the central issue of law raised in the Petition for Writ of Certiorari by the simple expedient of disavowing a material and controlling portion of its own decision herein.

A RECENT DECISION OF THE SEVENTH CIRCUIT CONFIRMS THE FACT THAT SAID CIRCUIT ADHERES TO A "PARTIAL MOTIVATION" STANDARD.

In our Petition for Writ of Certiorari, we maintained that the Seventh Circuit Court of Appeals, by approving the Board's use of a partial motivation standard, thereby sanctioned an erroneous application of Section 8(a)(3) of the Act. Recent events demonstrate conclusively the correctness of Petitioner's assessment of the Seventh Circuit's position in discrimination cases.

On June 8, 1973, one day after the filing of the Petition for Writ of Certiorari herein, the Seventh Circuit entered its order in the case of *P. G. Berland Paint City* v. *NLRB*, (1973, reviewing 199 NLRB No. 145) No. 72-1943, __ F.2d __, a discharge case similar on its facts to the instant case.[1] Addressing itself specifically to the question of employer motivation, the Court said:

> "The Company does not deny that there was evidence of union animus on its part directed against this employee. Rather, the Company maintains that Van Ryswyk was not discharged, but voluntarily quit his job. There is no dispute that the employee absented himself from his job for a period of three working days. The parties disagree over whether the absenteeism was authorized by the Company. Assuming *arguendo* that Van Ryswyk absenteeism was unauthorized and therefore would have justified his dismissal, there is still substantial evidence from which the Board might reasonably conclude that the discharge was motivated *at least in part* because of the employee's concerted activity. Such circumstances, *at least in this Circuit*, constitute a violation of the Act, See *NLRB* vs.

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[1] Petitioner respectfully calls to the Court's attention the *Berland* Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 73-60, filed shortly after the instant petition, which raises issues of law identical to those raised herein.

Tom Wood Pontiac, Inc., 447 F.2d 383, 386 (7th Cir. 1971); *Borck Motor Sales, Inc.* vs. *NLRB*, 425 F.2d 677, 680 (7th Cir. 1970), cert. denied, 400 U.S. 823 (1970); *contrast NLRB* v. *Fibers International Corp.*, 439 F.2d 1311 (1st Cir. 1971)" (emphasis added)[2]

It should be noted that in the foregoing excerpt of its decision in *Berland*, the Court not only reaffirms its adherence to the partial motivation standard but also acknowledges the conflict which exists on this issue between its decisions and those of the First Circuit.

We contend that the need for this Court to resolve this conflict is clear. Failure to do so can only foster continued unfair and improper resort to subjective "partial motivation" findings in cases where abundant evidence of independent lawful grounds for discharge exists, as in the case at bar.

CONCLUSION

For reasons stated herein and in the Petition for Writ of Certiorari, the Writ should be granted.

Respectfully submitted,

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
Attorneys for Petitioner

Of Counsel:

WITWER, MORAN & BURLAGE
141 West Jackson Boulevard
Chicago, Illinois 60604

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[2] The text of the complete decision of the Seventh Circuit Court of Appeals in *Berland* is reproduced in the Appendix annexed to this brief at page A-1, supra.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued May 24, 1973

June 8, 1973

Before

Hon. Tom C. Clark, Associate Justice*
Hon. Luther M. Swygert, Chief Judge
Hon. William J. Campbell, Senior District Judge**

G. BERLAND PAINT CITY, ., Petitioner		Petition for review of an order of the National Labor Relations Board.
72-1943	vs.	
TIONAL LABOR LATIONS BOARD, Respondent		

ORDER

. G. Berland Paint City, Inc. has petitioned to review set aside an order of the Board finding that the Comy has discriminated against employee Gerhardt Van wyk in violation of §§ 8 (a) (3) and (1) of the National or Relations Act (29 U S C §§ 158 (a) (1) and (3)). Board also concluded that the Company violated (a) (1) of the Act by threats of retaliation in order id itself of the union. The Board has filed a cross apation for enforcement of its order. The question thus whether there is substantial evidence in the record to port the order of the Board.

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ssociate Justice Tom C. Clark of the United States reme Court, Retired, is sitting by designation.
Senior District Judge William J. Campbell of the Nor- n District of Illinois is sitting by designation.

This case is atypical in the sense that there is direct evidence to support the findings of the Board. When employee Van Ryswyk was discharged, he was told by one of the Company's owners that he had caused him "too much trouble with the Union and the Labor Board." Upon seeking reemployment at a later date, the employee was further informed that he could not be rehired until the Company got rid of the Union. We conclude that these incidents provide ample support for the Board's conclusion that the Company discharged employee Van Ryswyk and refused to reinstate him in retaliation for his Union activity. Van Ryswyk had previously participated in a strike against the Company and had also filed a grievance against the Company sometime prior to these incidents.

The Company does not deny that there was evidence of union animus on its part directed against this employee. Rather, the Company maintains that Van Ryswyk was not discharged, but voluntarily quit his job. There is no dispute that the employee absented himself from his job for a period of three working days. The parties disagree over whether the absenteeism was authorized by the Company. Assuming *arguendo* that Van Ryswyk absenteeism was unauthorized and therefore would have justified his dismissal, there is still substantial evidence from which the Board migh reasonably conclude that the discharge was motivated at least in part because of the employee's concerted activity. Such circumstances, at least in this Circuit, constitute a violation of the Act. See *N L R B vs. Tom Wood Pontiac, Inc.*, 447 F.2d 383, 386 (7th Cir. 1971); *Borek Motor Sales, Inc.* vs. *N L R B*, 425 F.2d 677, 680 (7th Cir. 1970); *cert denied*, 400 US 823 (1970); contrast *N L R B v. Fibers International Corp.*, 439 F. 2d 1311 (1st Cir., 1971).

There is also substantial evidence to support the Board's conclusion that the Company violated § 8 (a) (1) of the Act by threats of retaliation in order to eliminate the Union at its place of business. Again, the record contains several instances of statements by one of the Company owners indicating that he intended to "get rid of" the

on. In this regard, the Company characterizes the mony against it as "inherently improbable." Inasmuch redibility assessments are within the province of the inistrative Law Judge, we conclude that the Board's ing of an independent § 8 (a) (1) violation is sup- ed by substantial evidence in the record as a whole.

he order of the Board will be enforced.